

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT
COUNTY OF RICHLAND)	OFFICER FOR CONSTRUCTION
)	
)	
IN THE MATTER OF: PROTEST)	DECISION
STATEWIDE ASBESTOS SURVEY-)	
PHASE IV)	
STATE PROJECT F07-9418-MJ)	POSTING DATE: AUGUST 29, 2000
DAVIS & FLOYD, INC.)	
vs.)	
OFFICE OF GENERAL SERVICES)	
_____)	

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from DAVIS & FLOYD, INC. (D&F) under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for an administrative review of the award for the STATEWIDE ASBESTOS SURVEY-PHASE IV (Project) for the OFFICE OF GENERAL SERVICES (OGS). Pursuant to §11-35-4210(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and determined that mediation was not appropriate. A hearing was conducted on August 16, 2000.

NATURE OF THE PROTEST

Pursuant to §11-35-3210 and §11-35-3220 of the Code, OGS solicited statements of qualifications and experience for architectural and engineering firms to perform Phase IV of a state-wide asbestos survey of state-owned buildings. The responses were evaluated by the Agency Selection Committee (Committee), which established a list of firms for interviewing and final selection. D&F was not selected and protested, alleging numerous errors in the procurement process. Among the issues of protest, D&F complained that "...the Committee did not adhere to the evaluation criteria set forth in §11-35-3220(5) in making the selection..." (Protest Letter at ¶ 1.a.)

FINDINGS OF FACT

1. On February 17, 2000, OGS advertised for professional services in *South Carolina Business Opportunities* (SCBO).
2. On March 17, 2000, OGS received 15 responses and the Committee subsequently established a short-list of firms for final interviews.

3. On March 28, 2000 OGS issued a letter to each short-listed firm setting the date, time, and place for the interview. The letter also outlined the evaluation criteria that would be used during the interview, as follows:

The six member Selection Committee will rank interviews [sic] according to:

1. *Past Performance*
2. *Ability of Professional Personnel*
3. *Demonstrated ability to meet time and budget requirements*
4. *Location*
5. *Recent, current, and projected workload*
6. *Creativity and insight related to the project*
7. *Related experience on similar project [sic]*
8. *Work plan related to the project*

4. On April 19, 2000 OGS conducted the short-list interviews, ranked the firms using the standard forms, and then issued the Notice of Intended Award to F&ME Consultants.
5. On May 4, 2000 D&F protested OGS's intent to award a contract for the Project to F&ME.

CPOC FINDINGS

At the outset of the hearing, F&ME submitted a lengthy motion to dismiss all of D&F's issues. In considering the merits of the F&ME motion, the CPOC became concerned with the issue labeled 1.a. in the D&F Request for Resolution. In considering this issue, the CPOC reviewed OGS's letter notifying the firms selected for the short-list interviews (Exhibit 1), the Committee's score sheets (Exhibit 2), and the relevant provision of the Code (§ 11-35-3220(5)). In addition, Aaron Redmond, Chair of the Agency Selection Committee, confirmed that the March 28 letter was the only documentation outside the original SCBO advertisement that gave the participating firms notice of the evaluation criteria to be used in the interview and scoring process. Both the statute and the *Manual for Planning and Execution of State Permanent Improvements-Part II* speak clearly and unequivocally on the issue of selection criteria for professional services - only the criteria listed in §11-35-3220(5) may be used by the State in selecting a design professional.

In its only opinion on this issue, the Panel reached this same conclusion. In re: Architectural Services Contract for Replacement of Central Correctional Institute-Lee Correctional Institute, Case No. 1989-5 (transcript of oral decision by Panel), reprinted in Decisions of the Procurement Review Panel 1989-1990. In that case, the Panel concluded that the Code sets forth the only criteria which the State could use in selecting an architect, as follows:

The Motion that Counsel has come up for us is:

I would move to the Panel that the Panel find that the Procurement Code in Section 11-35-3220(5) on its face sets forth the only criteria which can be used by the State in selecting an architect:

Further, that the Panel find that Selection Committee did not consider as a criteria which firm had the best interests of the Department at heart;

Further, that the Panel find that Selection Committee did not consider as a criteria the minority business status of the firms interviewed;

And that the Panel find that the Selection Committee did consider as a criteria quality of each firm's presentation, and that such criteria is not one of the six criteria set forth in Section 11-35-3220(5).

Finally, that because criteria other than those set forth in the Procurement Code were used and the use of such criteria materially affected the ranking and selection process, the Department shall resolicit the architectural services in question here, and shall use only the criteria set forth in the Code to rank and select the architects. [emphasis original]

The CPOC finds that OGS impermissibly created an additional selection criterion, and further, that such an act could reasonably be expected to influence the nature of the firms' interview presentations and the subsequent scoring. Given the self-evident discrepancies among the statutory criteria, the criteria listed in the OGS notice letter, and the criteria listed in the score sheets, the CPOC finds that the selection process for the Project is contrary to law and is irreparably tainted. In considering the appropriate remedy, the CPOC is mindful that the Panel's remedy in Case No. 1989-5 was to order resolicitation. Accordingly, the solicitation is hereby canceled pursuant to §11-35-4310(2)(a). The CPOC states that this ruling should in no way be interpreted as restricting the right of a Selection Committee to amplify or particularize any of the seven selection criteria to reflect the needs of a specific project, provided such amplification or particularization is fully consistent with the intent of the statutory criteria, is communicated to all prospective offerors as part of the solicitation documents, and is used in the scoring process. Further, this ruling should in no way be construed as a finding on the merits of any other issue raised by D&F. The Protest was resolved on a single issue raised during the pre-hearing motions without either side presenting its full case. Accordingly, the CPOC has not considered any issue other than the one on which this protest is resolved.

Regarding the resolicitation, both parties have indicated their preference regarding the relief to be granted. F&ME asks that the CPOC appoint the same selection committee for the resolicitation. In contrast, D&F asks that, if resolicitation is ordered, that the CPOC's decision prohibit any member of the current Agency Selection Committee from serving on that committee in the resolicitation

process. Neither request can be granted. First, with regard to D&F's request, the relief they are requesting was not requested in their protest letter. Second, with regard to both requests, the CPOC feels obliged to follow the Panel's example in Case No. 1989-5 and order resolicitation, without offering any additional instructions. Third, and most importantly, the CPOC simply does not have such authority. Whatever the rule may be in other areas of procurement, the Code is extremely clear about who appoints members of an Agency Selection Committee for purposes of selecting design professional. Pursuant to §11-35-3220, the head of an agency, not the CPOC or State Engineer, selects the members of an agency selection committee. If, in the process of resolicitation, any competing firm believes that the decision of the next agency selection committee is clearly erroneous, arbitrary, capricious, or contrary to law, that firm will have an opportunity to protest that award and seek any relief available under the Procurement Code.

DECISION

It is the decision of the Chief Procurement Officer for Construction that the solicitation for Statewide Asbestos Survey-Part IV is canceled. The Office of General Services is directed to resolicit for these services in a manner consistent with the Procurement Code and at such time as may meet the agency's programmatic needs.

A handwritten signature in black ink that reads "Michael M. Thomas". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Michael M. Thomas
Chief Procurement Officer
for Construction

August 29, 2000
Date

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review shall be directed to the appropriate chief procurement officer who shall forward the request to the Panel or to the Procurement Review Panel and shall be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.